



LAWYERS AS CONSERVATORS AND GUARDIANS: JUSTICE, THE RULE OF LAW, AND THE RELEVANCE OF SIR THOMAS MORE

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I. INTRODUCTION

A “perfect storm” constitutes an amalgam of factors that produces a tumultuous event.¹ Often associated with atmospheric disturbances, the term

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1. See generally SEBASTIAN JUNGER, *THE PERFECT STORM: A TRUE STORY OF MEN AGAINST THE SEA* (1997) (employing the phrase “the perfect storm” in a meteorological sense to refer to the Halloween Gale of 1991, but more generally to describe a serendipitous confluence of events which results in something astounding and often catastrophic). For widespread popular cultural use, see generally Joseph Blocher, *School Naming Rights and the First Amendment’s Perfect Storm*, 96 GEO. L.J. 1 (2007) (referring to school naming rights as a lens to examine the conflict of governmental speech, forum analysis, and commercial speech); Daniel Gross, *The Perfect Storm that Could Drown the Economy*, N.Y. TIMES, May 8, 2005, at WK1(L) (referring to the rising interest rates, the housing bubble, and increased consumer spending as creating a perfect storm of economic catastrophe); Marianne M. Jennings, *A Primer on Enron: Lessons from A Perfect Storm of Financial Reporting, Corporate Governance and Ethical Culture Failures*, 39 CAL. W. L. REV. 163 (2003) (stating that no

aptly applies to the present state of the academy and the profession in general. Jokes that depict lawyers with stereotypically negative traits impliedly connote a general antipathy toward legal practitioners.² This perception, coupled with the economic downturn's devastating impact on the legal profession,³ has produced one of the most challenging moments in the academy's history. With applications to law school in decline,⁴ students wary of assuming the debt required to pursue a law degree, and a shortage of resources that ensure institutional vibrancy, legal educators face the daunting

single aspect of corporate governance, audit rules, or corporate compliance programs was responsible for the perfect storm of the Enron fiasco); Corinne A. Marasco, *Biotech's 'Perfect Storm,' The Push for Energy Independence May Yield More Bioenergy-related Jobs*, 85 CHEM. & ENG'G NEWS 38 (2007) (describing the push for energy independence and pursuit of biofuels as creating a perfect storm of yielding a higher need for bio-energy related jobs).

2. See generally MARY ANN GLENDON, *A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY* (First Harvard Univ. Press paperback ed. 1996) (depicting the legal profession as a system of turbulence where the future of the legal profession and American democracy is at stake due to the arrogance, unruliness, and greed of American lawyers); Leonard E. Gross, *The Public Hates Lawyers: Why Should We Care?*, 29 SETON HALL L. REV. 1405 (1999) (discussing the public's negative image of lawyers and the rising concern of lawyers to defend their public image); JONATHAN HARR, *A CIVIL ACTION* (1996) (portraying the elusiveness of justice and the dishonesty of lawyers defending families of children with leukemia in a large toxic tort case). See also ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 13 (First Harvard Univ. Press paperback ed. 1995) (questioning lawyers' basic honesty and trustworthiness in relation to the decline of the "lawyer-statesmen" who embodies more than just legal persuasion and technical proficiency).

3. See generally Gillian K. Hadfield, *Legal Barriers to Innovation: The Growing Economic Cost of Professional Control over Corporate Legal Markets*, 60 STAN. L. REV. 1689 (2008) (discussing the ways in which the declining economy has limited what may be offered as a potential legal product and has hindered legal innovation because of the declining budgets for corporations to devote to lawyers and legal issues); Michael Kelly, *A Gaping Hole in American Legal Education*, 70 MD. L. REV. 440 (2011) (analyzing the consolidation of law firms, the growth of women in the legal market, and organization moves done by firms to insulate the legal profession from market forces); see also LEXISNEXIS, *STATE OF THE LEGAL INDUSTRY SURVEY COMPLETE SURVEY FINDINGS* 10 (2009) (reporting in its survey results that over half of the attorneys surveyed believe that the recession will permanently change legal practice); Eli Wald, *Foreword: The Great Recession and the Legal Profession*, 78 FORDHAM L. REV. 2051, 2051-52 (2010) (discussing the devastating impact of the economic downturn on the legal profession in terms of unprecedented layoffs, salary decreases, and hiring freezes resulting and extraordinary number of unemployed law school graduates nationwide); Debra Cassens Weiss, *First-Year Associates Bear the Brunt of Lower Bonuses; Some See Cuts of 71%*, ABAJOURNAL.COM (Dec. 21, 2009, 9:09 AM), http://www.abajournal.com/news/article/first-year_associates_bear_the_brunt_of_lower_bonuses_some_see_cuts_of_71 (providing a statistical report of decreases in American lawyers' salaries and bonuses from 2008 onward).

4. Daniel O. Bernstine, *A First Look at the Numbers*, LSAC REPORT: NEWSLETTER FROM THE LAW SCHOOL ADMISSION COUNCIL (Law School Admission Council, Newtown, Pa.), Dec. 2010, at 3 (reporting that the total number of LSAT administered in June and October 2010 was 87,318, a drop of six percent from 2009; the October test alone was down eleven percent from the same test in 2009).

challenge to ensure an educative quality that emphasizes the importance of ethics, professionalism, and respect for the rule of law.⁵

The timeliness of this symposium, which examines the lawyer's role as conservator of the rule of law and professional decorum, cannot be overstated. The "perfect storm" that every legal educator confronts compels focused reflection on the fundamentals of the profession. Yet this admonition raises a critical question: How do academics inculcate these important values? My modest contribution to this important colloquy suggests an examination of history to gain a revelatory perspective on the duty of lawyers and educators during troubling times. In my view, the historic narrative of Sir Thomas More, Lord Chancellor of England during the sixteenth century, constitutes an instructive corollary in the discussion of the lawyer's role in society.

Noted historians and playwrights have chronicled More's refusal to endorse King Henry VIII's ecclesiastical and political proclamations.⁶ This legendary lawyer's strict adherence to principle, which ultimately led to his

5. See generally Deanell Reece Tacha, *Training the Whole Lawyer*, 96 IOWA L. REV. 1699 (2011) (discussing what American legal educators must do to form "good" lawyer versus "great" lawyers particularly focusing on professionalism and civic involvement).

6. See generally PETER ACKROYD, *THE LIFE OF THOMAS MORE* (1998) (providing an extensive and detailed account of the events of More's life); PETER BERGLAR, *THOMAS MORE: A LONELY VOICE AGAINST THE POWER OF THE STATE* (portraying many facets of More's life as a statesman, family man, and devout individual dedicated to a life of prayer); ROBERT BOLT, *A MAN FOR ALL SEASONS: A DRAMA IN TWO ACTS* (1962) (recounting the later part of More's life and eventual trial and execution); R.W. CHAMBERS, *THOMAS MORE* (1949) (depicting More as a martyr and great statesman with consistent political ideals); ALISTAIR FOX, *THOMAS MORE: HISTORY AND PROVIDENCE* (1982) (noting the significance of More's death as perpetuated by his personal philosophy); J.A. GUY, *THE PUBLIC CAREER OF SIR THOMAS MORE* (1980) (analyzing More's contribution to English society through his career achievements and dedication to the law); WILLIAM HOLDEN HUTTON, *SIR THOMAS MORE* (2011) (reproducing the original work by Hutton published in 1923 summarizing the life, politics, and religious of Thomas More and depicting More as a "great hero of conscience"); JUDITH P. JONES, *THOMAS MORE* (1979) (assessing the historical and literary significance of More's writings as a Christian contemplating death); ANTHONY KENNY, *THOMAS MORE 1* (1983) (analyzing More's contribution to the "standard English conception of the English character" through his service and scholarship); RICHARD MARIUS, *THOMAS MORE* (1984) (depicting More as a complex, misrepresented individual torn between religious beliefs and worldly concerns); LOUIS L. MARTZ, *THOMAS MORE: THE SEARCH FOR THE INNER MAN* (1990) (presenting a factual account of the events surrounding More's last writings and effect of the events on their content); ANTHONY MUNDAY ET AL., *SIR THOMAS MORE* (1990) (including portions reportedly written by William Shakespeare); E.E. REYNOLDS, *THE FIELD IS WON: THE LIFE AND DEATH OF SAINT THOMAS MORE* (1968) (assessing More's effects on the Renaissance Period and Reformation); E.M.G. ROUTH, *SIR THOMAS MORE AND HIS FRIENDS: 1477-1535* (Russell & Russell, Inc. 1963) (emphasizing More's character as extracted from his own writings). For cinematic adaptation of Robert Bolt screenplays, see generally *A MAN FOR ALL SEASONS* (Turner Home Entm't 1988); *A MAN FOR ALL SEASONS* (Columbia Pictures 1966).

demise,⁷ demonstrates the timeless conflict between personal beliefs and professional expectations. His sixteenth century dilemma remains highly instructive in the contemporary examination of the function of lawyers and legal educators. The “perfect storm” of challenges in the legal profession⁸ compels maintenance of the profession’s ideological compass that stresses respect for the rule of law, while acknowledging the challenges that test the elasticity of legal rules. Legal educators must commensurately seek opportunities to increase student (and practitioner) awareness of the periodic conflict of personal beliefs and professional expectations and how that conflict relates to the rule of law imperative.

Legal educators, particularly during challenging times, must discover strategies that impress upon students the important role of lawyers as conservators of the rule of law. Part II of this Essay briefly demonstrates the historical relevance of Thomas More’s narrative to contemporary issues facing the profession. Part III continues with an explanation of how narratives such as More’s can be employed pedagogically to raise awareness of the lawyer’s fundamental role and challenges in fulfilling that role. The Essay concludes with the cautionary admonition that, despite challenges, the legal academy and profession in general must use innovative strategies that inspire respect for the rule of law and recognize the cognitive difficulties that often impact strict adherence to rules.

The daunting challenges that presently beset legal education and the practice of law compel greater focus on justice, respect for the rule of law, and professionalism. Certainly Thomas More’s legendary dilemma of belief versus expectation illustrates the timeless salience of this credo. Perhaps a look back at More’s narrative will not only shed light on the context of his dilemma, but also inspire a renewed focus on lawyers’ duties as conserva-

7. See Peter J. Galie & Christopher Bopst, *Great Political Trials of the Millennium*, 27 LITIG. 39, 41, 44 (2001) (discussing the trial of Sir Thomas More as among “great” trials that represent tension among the state and the individual and was a dramatic spectacle of opposing ideas fundamental to civilization); Stanley L. Jaki, *Patterns over Principles: The Pseudoscientific Roots of Law’s Debacle*, 38 AM. J. JURIS. 135, 154 (1993) (addressing the Sir Thomas More Society of Harvard Law School about the turmoil between conscience and serving the sovereign during the ten years before More was sent to the Tower of London); Milton R. Konvitz, *Civil Disobedience: Reflections on the Contribution of James Luther Adams*, 12 J.L. & RELIGION 9, 20 (1995-1996); John T. Noonan, Jr., *A Catholic Law School*, 67 NOTRE DAME L. REV. 1037, 1039 (1992); Stephen F. Smith, *Cultural Change and “Catholic Lawyers,”* 1 AVE MARIA L. REV. 31, 53-54 (2003) (speaking on the need for Catholic lawyers in modern society reminiscent of Sir Thomas More); David O. Stewart, *Shutting the Door: Decisions Impose New Burdens on Aliens Seeking a Home in the United States*, 78 A.B.A. J. 40, 42 (1992). See generally Edward McGlynn Gaffney, Jr., *The Principled Resignation of Thomas More*, 31 LOY. L.A. L. REV. 63, 72-73 (1997) (noting that More’s demise was perpetuated by a firm resignation to his religious principles, despite the effectual defiance of Henry VIII’s proclamations).

8. See *supra* note 1.

tors of the profession's ideals. Justice and respect for the rule of law remain constant, instructional goals.

II. THE RELEVANCE OF MORE'S HISTORIC NARRATIVE TO THE LAWYER'S ROLE AS CONSERVATOR OF THE RULE OF LAW

The historical narrative of Sir Thomas More has now become legend.⁹ Most scholars know that More was the former Lord Chancellor of England,¹⁰ who refused to endorse King Henry VIII's ecclesiastical proclamations.¹¹ Given the plethora of sources that have described More's life and relationship with Henry VIII, I will not delve too deeply into that history in this Essay. Suffice it to say, however, that More's refusal to endorse the objectives of Henry VIII, primarily due to his extraordinary adherence to the theological principals of his strict Catholic upbringing, represents an extraordinary conflict between a lawyer's duty to the rule of law, her beliefs, and the decision-making required in order to balance these competing norms.¹² Similar to More, most lawyers bring beliefs into their decision-making that are moralistic in character and endemic to their sense of personhood.

As is commonly known, Henry VIII issued proclamations designed to restructure societal order. His acts of supremacy¹³ and succession¹⁴ consti-

9. See generally ACKROYD, *supra* note 6; Gaffney, Jr., *supra* note 7; REYNOLDS, *supra* note 6; THOMAS L. SHAFFER, AMERICAN LEGAL ETHICS 170-75 (1985) (exploring More's employment of both personal moral and professional morals through More's interaction with Henry VIII particularly in confronting Henry's proclamations).

10. Frances Gibb & Richard Ford, *Supreme Court to Be Heart of New Justice System*, TIMES (London), June 13, 2003, at 6; *Great Britain Abolishes Post of Lord Chancellor*, ROANOKE TIMES, June 14, 2003, at A6; Warren Hoge, *Britain: Blair Shuffles Ministers*, N.Y. TIMES, June 13, 2003, at A6; Steven Morris, *Cabinet Reshuffle: 1,398 Years After Angmen-dus, the Lord Chancellor's Reign Comes to an End*, GUARDIAN (London), June 13, 2003, at 4.

11. See generally ACKROYD, *supra* note 6; CHAMBERS, *supra* note 6; FOX, *supra* note 6; GUY, *supra* note 6; JONES, *supra* note 6; see also MARTZ, *supra* note 6, at 64; ROUTH, *supra* note 6.

12. See CHAMBERS, *supra* note 6, at 395 (declaring More a "hero of the Catholic" faith who died for principles of unity and discipline); FOX, *supra* note 6, at 147 (discussing More's concern that orthodox beliefs and practices embody the right perception); GUY, *supra* note 6, at 154-55 (hypothesizing which beliefs More would have supported and which he would have rejected). See generally KENNY, *supra* note 6 (chronicling More's fight for orthodoxy against heresy). See also Smith, *supra* note 7, at 52-55 (describing More's incorporation of personal conviction into the practice of law); Michael E. Tigar, *Rationing Justice—What Thomas More Would Say*, 2 J. INST. FOR STUDY LEGAL ETHICS 187, 192-95 (1999) (comparing More's dilemma concerning Henry VIII's proclamations with modern problems faced by the author and attorneys in general).

13. See *infra* note 31.

14. See ACKROYD, *supra* note 6, at 356 (noting the introduction of an Act of Succession in 1534, which proclaimed Henry VIII's marriage to Catherine of Aragon to be void and

tuted human-made laws that contrasted sharply with Thomas More's natural law beliefs. Because Henry VIII's proclamations appeared to More to be tied more to personal and political ends, rather than to a divine order,¹⁵ More could not in good conscience endorse them, given the direct contravention of Henry VIII's proclamations to a higher order of ecclesiastical law.¹⁶ Of course some may argue that the king's proclamations had reasonable validity. Designed to provide societal order, the proclamations of the then sovereign could be considered positive law and thus accorded validity.¹⁷ However, in More's view, which was mirrored by many in the sixteenth century given the strong dominance of ecclesiastical rule,¹⁸ the king's proclamations

annulled); see also KENNY, *supra* note 6, at 70; MARIUS, *supra* note 6, at 458; REYNOLDS, *supra* note 6, at 296; ROUTH, *supra* note 6, at 201.

15. Robert P. Lawry, *Images and Aspirations: A Call for a Return to Ethics for Lawyers*, 48 SAN DIEGO L. REV. 199, 227 (2011) (discussing model rules of behavior for lawyers and popular images of lawyers with a focus on Sir Thomas More's moral dilemma); see, e.g., ACKROYD, *supra* note 6, at 378-79. The author notes that the *Act in Restraint of Appeals* was passed to cut off appeals to the Pope in order to distance England from the influence of the church. *Id.* at 338-40. This was a precursor for the Act of Supremacy, which proclaimed Henry to be the Head of the Church. *Id.* at 379. The motive behind the promotion of these parliamentary acts was to open the door for a declaration of Henry's marriage to Catherine of Aragon as null and void, an act the Pope would not perform. A Treason Act was subsequently passed, requiring the execution of any persons found guilty of accusing the King of heresy for his assumption of power in the Church or for refusing to acknowledge the King's power in that position. *Id.* at 338-40; see also MARIUS, *supra* note 6, at xiii-xxiv (depicting More as a complex, misrepresented individual torn between religious beliefs and worldly concerns).

16. See generally Peter Ackroyd, *More and Theology*, 53 MERCER L. REV. 1055 (2002); Joseph Allegretti, *The Unity of Law and Religion: A Response to Ackroyd and Vining*, 53 MERCER L. REV. 1065 (2002); Hon. William G. Bassler, *More About More*, 41 CATH. LAW. 297 (2002). See also Gaffney, Jr., *supra* note 7, at 72-73; Stanley Hauerwas & Thomas L. Shaffer, *Hope in the Life of Thomas More*, 54 NOTRE DAME LAW. 569 (1978-79); Thomas L. Shaffer, *More's Skill*, 9 WIDENER J. PUB. L. 295 (2000).

17. See COSTAS DOUZINAS, RONNIE WARRINGTON & SHAUN McVEIGH, *POSTMODERN JURISPRUDENCE: THE LAW OF TEXT IN THE TEXTS OF LAW* 19-20 (1991) (explaining the origins and evolution of natural law); DENNIS LLOYD, *THE IDEA OF LAW* 82-83 (1976) (providing, as a characteristic of natural law, that humankind and all matters of the universe are guided by gods and the spirits of the supernatural). For more regarding the change in the concept of natural law as it relates to European history, specifically to the European enlightenment, see Kenneth B. Nunn, *Law as a Eurocentric Enterprise*, 15 LAW & INEQ. 323, 339-44 (1997). See also AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (J.H. Burns & H.L.A. Hart eds., 1970); DAVID HUME, *A TREATISE OF HUMAN NATURE* (Archon Books 1965) (1911). For a more comprehensive explanation of positive law and other jurisprudential tenets, see generally WILLIAM M. WIECEK, *THE LOST WORLD OF CLASSICAL LEGAL THOUGHT: LAW AND IDEOLOGY IN AMERICA 1886-1937* (1998).

18. See Sir John Baker, *Human Rights and the Rule of Law in Renaissance England*, 2 NW. U. J. INT'L HUM. RTS. 3 (2004) (discussing the potential of reconciling "Henrician despotism" with consciousness and the natural Rule of Law); Ronald Beiner, *Three Versions of the Politics of Conscience: Hobbes, Spinoza, Locke*, 47 SAN DIEGO L. REV. 1107 (2010)

contravened a higher order. As a result, More either had to capitulate to the will of the sovereign, which would mean going against established ecclesiastical rule, or maintain a stricter sense of duty to the rule of ecclesiastical order. As a result, he seemingly viewed the king's proclamations as human-made edicts that had insufficient nexus to divine order. He, therefore, could neither follow nor endorse Henry VIII's proclamations irrespective of their arguable legitimacy. His only cognitive choice was to remain true to natural law principals and not endorse the king's proclamations. As a result, More paid the ultimate price with his life.¹⁹

More's over 460-year-old dilemma has continuing relevance. In my view, many lawyers today periodically grapple with the conflict between the expectations of either clients or others and a belief system that requires lawyers to enforce the rule of law. Professional situations that give rise to these dilemmas abound. If a lawyer believes that certain criminal acts contravene her deeply held moral convictions, would that lawyer in good conscience defend an individual who has admittedly committed those acts?²⁰ If a lawyer is asked to provide an opinion that might contravene the aims of a client, will the lawyer's opinion be reflective of the abstract rule of law or capitulate in some way to the will of the client?²¹ Other modern and even more

(providing an overview on the discourse of conscience from the seventeenth century which was rooted in sixteenth century religious philosophy and social circumstances).

19. See generally BOLT, *supra* note 6 (recounting the latter part of More's life and his persecution and highlighting More's eventual trial and execution).

20. See Christopher Johnson, *The Law's Hard Choice: Self-Inflicted Injustice or Lawyer-Inflicted Indignity*, 93 KY. L.J. 39 (2004-2005) (analyzing different theories of defense-decision allocation between the defendant and his or her lawyer). The adopted Rules of Professional Conduct for most states mirror those of the American Bar Association. These rules generally require an attorney to defend her client with reasonable diligence and competence, terminating the employment only for a narrow set of reasons or at the conclusion of all legal matters. See MODEL RULES OF PROF'L CONDUCT R. 1.1, 1.3, 1.16 (2012). The District of Columbia, Iowa, Massachusetts, Nebraska, New York, Ohio and Oregon have adopted versions of the American Bar Association's Model Rule 1.1, which provides: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." *Id.* R. 1.1; see also MODEL CODE OF PROF'L RESPONSIBILITY Canon 7 (1980). California and Maine, however, incorporate no requirement for continued representation and only require an attorney terminating representation to request permission of the governing tribunal (if required by that tribunal) and minimize prejudice to the client by giving adequate notice. See also 22 C.J.S. *Criminal Law* § 402 (2002) (noting a defense counsel's duty to represent the accused within the bounds of the law); MODEL CODE OF PROF'L RESPONSIBILITY EC 2-29 (1980) (stating a defense counsel may not be excused from a court appointment in a criminal proceeding based on belief that his client is guilty).

21. See Hauerwas & Shaffer, *supra* note 16, at 579 (1979) (contrasting More's adherence to legal principles with Thomas Cromwell's compromising of those principles in order to achieve "convenience"); H. Jefferson Powell, *Who's Afraid of Thomas Cromwell?*, 74 CHI.-KENT L. REV. 393, 407 (1999) (contrasting More's view of the law as firm principles

polemic examples of dilemmas exist. Think of the lawyer who believes that abortion is morally unjust. Would this individual represent physicians who routinely perform abortions?²² Would a prosecutor, who believes that the legally sanctioned death penalty violates a moral principal, zealously prosecute someone accused of capital murder?²³ Would an attorney whose belief systems are strongly rooted in religion—and who regularly represents those whose civil liberties have been abridged—accept as a client and zealously represent an atheist who challenges school prayer?

Other dilemmas of conscience occur in more commonplace situations. For example, what advice would an attorney give a major corporate client whose business practices routinely violate state and federal environmental regulations? How would an associate in a firm respond when the partner demands she cease work on a project due to the client's failure to pay, notwithstanding the merit of the client's claim?

I would think that few possess Thomas More's ideological fortitude, which would be required to resolve their dilemmas through a strict adherence to the rule of law. Indeed, the need to compromise or find ways in which individuals can achieve professional goals while adhering to the rule of law remains the ultimate testament of good advocacy and counsel. The question, which becomes a constant, is the degree to which attorneys appreciate this perennial conflict and what mechanisms should they use to resolve such conflicts. There are no magic solutions to many dilemmas of con-

necessary to preserve societal stability with Cromwell's view of the law as a malleable device with which those in power may create a stable society).

22. See Teresa Stanton Collett, *Speak No Evil, Seek No Evil, Do No Evil: Client Selection and Cooperation with Evil*, 66 *FORDHAM L. REV.* 1339, 1339 (1998) (arguing that a Catholic attorney's religious convictions should play a determinative role in her selection of clients); see also David Barnhizer, *Princes of Darkness and Angels of Light: The Soul of the American Lawyer*, 14 *NOTRE DAME J.L. ETHICS & PUB. POL'Y* 371, 431-32 (2000) (arguing that the pro-choice lawyer owes a duty to herself to not represent a client who wants to picket an abortion clinic); Lynn D. Wardle, *The Quandary of Pro-life Free Speech: A Lesson from the Abolitionists*, 62 *ALB. L. REV.* 853, 880-81 (1999) (noting Harvard Law Professor Robert H. Mnookin's belief that young lawyers representing the state in challenges to anti-abortion legislation often fail to offer a vigorous defense when armed with conflicting personal belief that abortion should not be restricted).

23. See Jill Jones, *The Christian Executioner: Reconciling "An Eye for an Eye" with "Turn the Other Cheek,"* 27 *PEPP. L. REV.* 127, 135 (1999) ("[I]t would be difficult for the prosecutor who questions the moral validity of capital punishment to zealously prosecute a capital case and argue for imposition of the death penalty."); Jason M. Schoenberg, Note, *Making the Constitutional Cut: Evaluating New York's Death Penalty Statute in Light of the Supreme Court's Capital Punishment Mandates*, 8 *J.L. & POL'Y* 337, 380-82 (1999) (arguing that, in New York, the lack of standards guiding a prosecutor's discretion to seek the death penalty may lead to arbitrary imposition and different sentences for similarly situated defendants in different jurisdictions, depending on the individual beliefs of the prosecutor); cf. David B. Wilkins, *Identities and Roles: Race, Recognition, and Professional Responsibility*, 57 *MD. L. REV.* 1502, 1509-10 (1998) (noting an African-American district attorney's refusal to seek the death penalty because of his belief that it is intrinsically racist).

science. A focus on solutions, however, misses the point.²⁴ Lawyers, however, should recognize the existence of such conflicts, remain cognizant of the situational variables that influence possible resolutions, and study situations such as More, which demonstrate the actualization of such conflicts and provide strategies for the resolution of those conflicts.

All dilemmas of conscience, including More's, share an essential element: adherence to the rule of law, when it conflicts with the expectations of others or other personal belief systems, is a ubiquitous staple in the legal profession. It becomes imperative that lawyers and legal educators recognize the prevalence of these perennial conflicts and seek opportunities to heighten awareness of, and focus on, the confluence of factors contributing to such conflicts.

III. TEACHING MOMENTS—UTILIZATION OF HISTORIC NARRATIVE TO REINFORCE RESPECT FOR THE RULE OF LAW

A. Prelude to Instruction—My Personal Narrative Involving the Rule of Law and Professional Expectations

The prior section of this Essay notes More's historic dilemma of conscience and the salience of the rule of law in decision-making.²⁵ As the brief exposé in Part II indicates, More's cognitive adherence to rules with ecclesiastical implications created a conflict with his superior's professional expectations. More's conflict, in my view, has contemporary relevance in today's profession. If one accepts this premise, then the utilization of historical narrative in strategies designed to demonstrate the complexity of legal rules and justice becomes critical. A central question, nonetheless, remains: Does More's or any other historical figure's parlance with the occasional conflict of rules and expectations apply to contemporary practice?

As I noted in Part II of the Essay, contemporary lawyers periodically confront conflicts between rules and expectations.²⁶ A narrative from my practice in the United States Judge Advocate's General Corps (JAGC) proves this point.

As a lawyer in the JAGC, I had an assignment with the Office of the Staff Judge Advocate of the 18th Airborne Division at Fort Bragg, North Carolina. In addition to the 18th Airborne Corps, Fort Bragg served as host

24. Blake D. Morant, *Lessons from Thomas More's Dilemma of Conscience: Reconciling the Clash Between A Lawyer's Beliefs and Professional Expectations*, 78 ST. JOHN'S L. REV. 965, 972 (2004) (advocating for a greater appreciation of both the prevalence of conflicts between personally held beliefs and expectations and an "understanding of the fundamental differences of contrary beliefs" to "contribute to more balanced decision-making by lawyers who confront troublesome dilemmas of conscience").

25. See *supra* Part II.

26. See *supra* notes 20-23 and accompanying text.

to the 82nd Airborne Division and the Special Forces Operation more commonly known as the Green Berets.²⁷ These highly specialized, combat-ready units routinely conducted exercises in wooded areas throughout the military installation. With the proliferation of pine trees and scrub growth, the wooded areas contained various fauna, including the then endangered red-cockaded woodpecker.²⁸

Military exercises, replete with artillery fire and the movement of personnel and materiel in the wooded areas of the installation, disturbed the red-cockaded woodpecker's habitat. This conflict between the Army's training exercises and the habitat of an endangered species raised an issue that became my first, and potentially most polemic, assignment as a lawyer. Did commanders, pursuant to military²⁹ and federal regulations,³⁰ have a legal duty to modify training procedures in order to secure the habitat of the red-cockaded woodpecker? My assignment admittedly lacked the dramatic urgency of More's consideration of King Henry VIII's proclamations,³¹ that dilemma, however, did pose strikingly similar issues of professional responsibility. Embedded in my consciousness was the fact that post commanders, who also were my superior officers, would recoil at the suggestion that they interrupt or modify training operations, irrespective of reasons related to environmental concerns. Similar to More, who perhaps knew that the refusal to endorse Henry VIII's proclamations might lead to reprisal,³² I sur-

27. See *Fort Bragg Organizations*, FORT BRAGG N.C. ORGANIZATIONS, <http://www.bragg.army.mil/Organizations.aspx> (last visited May 8, 2012) (identifying the 18th Airborne Corps and the 82nd Airborne Division as part of Fort Bragg).

28. For a description of the red-cockaded woodpecker and the Southern states' modification of its habitat, see generally ROBERT W. MCFARLANE, *A STILLNESS IN THE PINES: THE ECOLOGY OF THE RED-COCKADED WOODPECKER* (1992). See also Wendee Holtcamp, *Snooping on Red-Cockaded Woodpeckers: Revealing Aspects of Red-Cockaded Woodpecker Ecology*, NATIONAL WILDLIFE FEDERATION (Apr. 1, 2001), <http://www.nwf.org/News-and-Magazines/National-Wildlife/Birds/Archives/2001/Snooping-on-Red-Cockaded-Woodpeckers.aspx> (noting the endangered status of the red-cockaded woodpecker).

29. For military guidelines regarding endangered and threatened species, see generally DEP'T OF THE ARMY, ARMY REGULATION 200-3, NATURAL RESOURCES—LAND, FOREST AND WILDLIFE MANAGEMENT 19-26 (1995). For the current federal guidelines governing the military's implementation of the Endangered Species Act, see Interagency Cooperation—Endangered Species Act of 1973, 50 C.F.R. § 402.01-.09 (2012).

30. For current federal laws regarding the conservation of endangered species, see generally Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1544 (2006). The Act was in effect in 1979 and governed the military's interaction with the habitat of endangered species at that time. See *id.* § 1536(a).

31. Thomas More's refusal to endorse Henry VIII's proclamation to become head of the church and to vest his issue of Anne Boleyn as his successor is heavily documented. See ACKROYD, *supra* note 6 at 347-93; CHAMBERS, *supra* note 6, at 236-39; KENNY, *supra* note 6, at 62-90; MARIUS, *supra* note 6, at 371-493; MARTZ, *supra* note 6, at 5; REYNOLDS, *supra* note 6, at 226-371; ROUTH *supra* note 6, at 168-236; see also GUY, *supra* note 6, at 113-20.

32. See ACKROYD, *supra* note 6, at 347-58 (noting the King's anger after learning of More's refusal to endorse his proclamations).

mised that command displeasure with a legal opinion that insisted upon a change in operations could have adversely impacted my military career. Also similar to More, my personal beliefs influenced, to some degree, my approach to decision-making. Aside from the belief that endangered species must be preserved,³³ my respect for the rule of law remained resolute.³⁴ Of

33. One might surmise that an intense belief in the preservation of life of any form has a theological basis. See LLOYD, *supra* note 17, at 82-83; DOUZINAS, WARRINGTON & MCVEIGH, *supra* note 17, at 4; see also Douglas W. Kmiec, *Liberty Misconceived: Hayek's Incomplete Relationship Between Natural and Customary Law*, 40 AM. J. JURIS. 209, 223 (1995); Daniel Westberg, *The Relation Between Positive and Natural Law in Aquinas*, 11 J.L. & RELIGION 1, 2 (1994-1995) (noting the characteristic of natural law as human so long as that law is "derived from the law of nature" and law that deviates from the law of nature cannot be considered natural law but a "perversion of law" (quoting 1 ST. THOMAS AQUINAS, SUMMA THEOLOGICA 1014 (Fathers of the English Dominican Province trans., Benzinger Bros., 1947))); see also Katherine Corry Eastman, Comment, *Sexual Abuse Treatment in Kansas's Prisons: Compelling Inmates to Admit Guilt*, 38 WASHBURN L.J. 949, 949-50 (1999) (analogizing More's refusal to swear to the Oath of Supremacy as contrary to his own moral convictions with the Kansas requirement that an inmate admit to sexual offense in order to receive good time credits as contrary to the Fifth Amendment); FOX, *supra* note 6, at 243-45 (noting More's final work, *De Tristitia Christi*, as a reflection on his desire for martyrdom and the inevitable sacrifice in the name of God); JASPER RIDLEY, STATESMAN AND SAINT: CARDINAL WOLSEY, SIR THOMAS MORE, AND THE POLITICS OF HENRY VIII 263-77 (1982) (recounting More's adamant insistence on the persecution of heretics and persistence to religious convictions as described in his personal letters). Of course, the fervor with which one holds those beliefs would impact the willingness and compulsion to adhere to those beliefs.

34. While my view of the "rule of law" focuses on conformity with established legal rules and precedent, I readily acknowledge the many other conceptualizations of the doctrine. See Veronica M. Dougherty, *Absurdity and the Limits of Literalism: Defining the Absurd Result Principle in Statutory Interpretation*, 44 AM. U. L. REV. 127, 133 n.27 (1994) (quoting INTERPRETING STATUTES: A COMPARATIVE STUDY 535 (D. Neil McCormick & Robert S. Summers eds., 1991)). The author describes the Rule of Law as an internally complex doctrine that promotes the proper exercise of legislative power by stressing clear ex ante legislation, banning or restricting retrospections, and stipulating reasonable generality, clarity and constancy in the law. See *id.*; see also Arthur L. Goodhart, *The Rule of Law and Absolute Sovereignty*, 106 U. PA. L. REV. 943, 949 (1958) ("[I]n the United States the emphasis is placed primarily on the control of the federal and state legislatures by the rule of law as expressed in the Constitution, while in Great Britain and France the interest is centered almost entirely on the control of the executive."); Francis J. Mootz III, *Is the Rule of Law Possible in a Postmodern World?*, 68 WASH. L. REV. 249, 268-69 (1993); Laurie Anne Whitt, *Indigenous Peoples, Intellectual Property & the New Imperial Science*, 23 OKLA. CITY U. L. REV. 221, 247-48 (1998) (noting that rule of law doctrines such as the observance of precedent and faithfulness to historical practices result in the incorporation of a conservative bias into the law); Thomas M. Riordan, Comment, *Copping an Attitude: Rule of Law Lessons from the Rodney King Incident*, 27 LOY. L.A. L. REV. 675, 717 (1994) (arguing that "[t]he rule of law works only if the citizens maintain an attitude of legality;" however, civil disobedience is not inconsistent with respect for the law, but rather a "manifestation of the prophylactic function of the attitude of legality"); Sandra Lynne Tholen & Lisa Baird, Comment, *Con Law Is as Con Law Does: A Survey of Planned Parenthood v. Casey in the State and Federal Courts*, 28 LOY. L.A. L. REV. 971, 1042 n.577 (1995) (noting that under California's rule of law

course my beliefs paled in comparison to More's fervently held beliefs. Respect for the rule of law, nonetheless, remained an indelible and dominant factor in my review of legal matters. My dilemma, then, while not as critical as More's, bore remarkable similarity to his query: should my review of the military action favor the expectations of my commanders, or reflect an objective evaluation without regard to command expectations and the resultant consequences?

Applicable regulations compelled an objective evaluation of the legal question.³⁵ Expectations of military commanders, however, became an overwhelming constraint on objectivity. The plain language of regulations, both military and federal, appeared to limit actions that adversely impacted endangered species.³⁶ Operations that directly impact the habitat of a threatened species such as the red-cockaded woodpecker required modification, if not termination.³⁷ These legal rules and my adherence to the rule of law initially dominated my decision-making. As a result, the first draft of my opinion on the matter advised commanders to abandon completely their plans for a military exercise. Knowledge of the commanders' expectations, together with fear of the repercussions from an opinion that frustrated those expectations, compelled my more reasoned scrutiny of the issue.

A reexamination of the regulations led to a discovery of a plausible alternative to the complete abandonment of military exercises in the area inhabited by the red-cockaded woodpecker. Instead of a recommendation of a

doctrine, the rule necessary to decide a case conclusively establishes the rule in that case as well as the rights of the parties in any retrial or appeal of that case).

35. See W. JETHRO BROWN, *THE AUSTINIAN THEORY OF LAW* 1-3, 10-19 (1912); see also Daniel C.K. Chow, *A Pragmatic Model of Law*, 67 WASH. L. REV. 755, 763 n.22 (1992) (stating that Austin believed that "law was a set of rules embodying the desire of the sovereign expressed in a command that others behave in a certain way, backed by the sovereign's power and will to sanction disobedience"); see generally H.L.A. HART, *THE CONCEPT OF LAW* 49-120 (1961) (debunking sovereign power as the legitimizing source of law and proposing the complexity of societal norms and organizations as the principal foundation of modern legal systems). My more pluralistic definition of the term "sovereign" complicates the positive law aspects of this particular legal assignment. The regulations governing endangered species constituted archetypical positive law, given their genesis from traditional sovereign power, the legislature or its agency.

36. Section 11-2(b) of Army Regulation 200-3 requires the Army, in compliance with section 7(a)(2) of the Endangered Species Act, to refrain from any operations "likely to jeopardize the continued existence of any listed [endangered] species or result in the destruction or adverse modification of critical habitat." DEP'T OF THE ARMY, *supra* note 29, at 19. In the event the Army anticipates any such operation, the regulation sets forth the specific requirements mandated by the Endangered Species Act as to the formal consultations with the Fish and Wildlife Service necessary to determine the impact on the habitat of those species.

37. See Endangered Species Act of 1973, 16 U.S.C. § 1536(a)(2) (2006) ("Each Federal agency shall . . . insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species . . .").

cessation of the exercises, my amended opinion suggested that the commanders move the exercises to an area where the red-cockaded woodpecker did not nest or adjust the timing of certain exercises that would reduce noise pollution.³⁸

This amended review, while met with some consternation, became a “win” to commanders who saw my amended opinion as a legal strategy that maintained their mission. Notwithstanding the positive outcome of my opinion on the proposed military exercise, the omnipresent conflict between my belief in the rule of law and my superior’s expectations consumed my consciousness. It also confirmed the salience of this conflict in many legal actions regardless of their nature.

My brush with the conflict between belief in the rule of law and professional expectation has become both informative and instructional. Perhaps the most obvious point might lie in advice that leads to the successful resolution of such conflicts. Such advice, if discoverable, would lack credibility if not effectiveness. Most helpful is the appreciation of the reality of such conflicts and the need to encourage students to appreciate the reality as well. The latter has become my own *cause celebre* that, hopefully, serves a template for other educators.

B. Using Narrative to Demonstrate the Complexity of the Rule of Law in Contemporary Practice

Of course the traditional professional responsibility course, which is a requirement in most law schools, remains fertile ground for the discussion of the rule of law and its conflict with beliefs and expectations.³⁹ It is doubt-

38. Compromise constitutes one tactic that could reduce the dissonance associated with contradictory beliefs. For a general discussion of dissonance-reduction strategies, see ELLIOT ARONSON, *THE SOCIAL ANIMAL* 192-94 (10th ed. 2008); ANN L. WEBER, *INTRODUCTION TO PSYCHOLOGY* 235 (1991). For a study demonstrating the influence of a group-setting on cognitive-dissonance, see David C. Matz & Wendy Wood, *Cognitive Dissonance in Groups: The Consequences of Disagreement*, 88 J. PERSONALITY & SOC. PSYCHOL. 22-37 (2005). It should be noted that contemporary J.A.G. Corps officers who review military actions for conformity with certain environmental laws will likely encounter less troublesome dilemmas of conscience than I. President George W. Bush relaxed various environmental requirements for the military in H.R. 1588, the National Defense Authorization Act for Fiscal Year 2004, which was passed by Congress and codified in Public Law No. 108-136 on November 24, 2003. See National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, 117 Stat. 1392, 1433 (2003) (amending 16 U.S.C. § 1533(a)(3)). Section 318(B)(i) of the statute, titled Military Readiness and Conservation of Protected Species, limits the Secretary of Interior’s ability to “designate as critical habitat any lands . . . owned or controlled by the [DOD], or designated for its use, that are subject to an integrated natural resources management plan.” *Id.* § 318(B)(i).

39. See AM. BAR ASS’N, *STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS* 302(a)(4) (2011).

ful, however, that many teachers of the subject delve into historical narrative to demonstrate the salience of this principle. While there is little empirical proof of this belief, the textbooks on the subject provide anecdotal evidence. Few of the typical books on professional responsibility use historical narratives such as that of Thomas More in their instructional materials.⁴⁰

Some teachers of professional responsibility have introduced historical narratives to note the importance of the rule of law in practice. Professor Donald Childress of Pepperdine University School of Law routinely devotes at least four to six weeks of his course in professional responsibility to Thomas More's dilemma and the implications of that dilemma to contemporary lawyering.⁴¹ Professor Childress's example notwithstanding, most courses in professional responsible stick to formulaic cases and examples that are more contemporary.

An embrace of historic narratives that demonstrate dilemmas of conscience forms an ideological foundation that reinforces the omnipresent conflict between the rule of law and professional expectations. As a consequence, I have sought to utilize More's narrative in a myriad of situations that implicate professional responsibility. Addresses to law faculties and students at a number of law schools have provided the opportunity to share

The Standards mandate that accredited law schools "require of all candidates . . . instruction in the duties and responsibilities of the legal profession. Such required instruction need not be limited to any pedagogical method as long as the history, goals, structure, and responsibilities of the legal profession and its members, included the ABA Models Rules of Professional Conduct, are all covered."

Deborah L. Rhode, *Into the Valley of Ethics: Professional Responsibility and Educational Reform*, LAW & CONTEMP. PROBS., Summer/Autumn 1995, at 139, 139 n.3 (discussing legal ethics education generally) (quoting AMERICAN BAR ASSOCIATION, STANDARDS FOR THE APPROVAL OF LAW SCHOOLS std. 302(a)(iv) (1993)); see, e.g., *Professional Responsibility*, FORDHAM UNIV. SCH. OF LAW, <http://law.fordham.edu/registrar/4708.htm> (last visited May 9, 2012) (stating that each J.D. student must complete one three-credit course in professional responsibility to obtain his degree); *Georgetown Law—Introduction to the JD Program*, GEORGETOWN LAW, <http://www.law.georgetown.edu/curriculum/jdprog.cfm#First> (last visited May 9, 2012) (requiring each J.D. student to take a course in professional responsibility to graduate).

40. See generally PAUL T. HAYDEN, *ETHICAL LAWYERING: LEGAL AND PROFESSIONAL RESPONSIBILITY IN THE PRACTICE OF LAW* (2d ed. 2007); LISA G. LERMAN & PHILIP G. SCHRAG, *ETHICAL PROBLEMS IN THE PRACTICE OF LAW* (2d ed. 2008) (addressing ethics through role playing exercises to instruct students in modern day ethical issues); DEBORAH L. RHODE & DAVID LUBAN, *LEGAL ETHICS* (5th ed. 2009) (using real life problems, doctrinal and statutory analysis, and leading cases to focus on ethical problems in practice); RICHARD ZITRIN, CAROL M. LANGFORD & NINA TARR, *LEGAL ETHICS IN THE PRACTICE OF LAW* (3d ed. 2007) (approaching legal ethics from a problem-oriented view).

41. DONALD EARL CHILDRESS III (TREY) CURRICULUM VITAE, available at <http://law.pepperdine.edu/academics/faculty/cv/childress.pdf> (recognizing Donald Earl Childress III, L.L.M. as an associate professor of law and a professor of "Ethical Lawyering" (Professional Responsibility) since 2008).

More's narrative and demonstrate the relevance of that narrative to contemporary legal practice.⁴²

Discussions of More and the conflicts that lawyers face in adherence to the rule of law need not be confined to classes in professional responsibility. Indeed, dilemmas of conscience occur in legal matters of every variety,⁴³ and students should appreciate this reality. As a result, I have often injected the lessons of More's narrative in contracts courses and seminars; More's narrative often sets the stage for negotiation exercises that require students to settle a dispute rather than seek a judicial resolution. In such exercises, students, whose client seeks an unreasonable judgment notwithstanding the weakness of her case and the exorbitant fees attributable to a full blown trial, must work with that client and the opposing counsel to seek a resolution that minimizes costs and provides some measure of restitution.⁴⁴

The use of narrative need not be confined to the education of law students. Indeed, instruction on the importance of the rule of law and the challenges to its salience require continual emphasis. As a consequence, narrative can become an effective tool in continuing legal education programs and professional colloquia. For example, I have presented in the North Carolina Bar Association's Continuing Legal Education Program on Thomas More and Ethics.⁴⁵ Recently, I have also presented my work on More to all of the JAGC attorneys and legal office personnel at Fort Bragg, NC, the site of my own dilemma of conscience more than thirty years ago. The entire staff have indirectly commented on the engaging nature of More's narrative and the effectiveness of that narrative in stimulating thought about the rule of law in contemporary practice.

The functional utility of historic narratives, which are admittedly anecdotal in nature, illustrates the instructive potential of narratives as tools to raise conscientiousness and reinforce ethical norms of the profession. This

42. I have shared my interpretation of More's dilemma of conscience to faculty, students, and lay persons at such venues as St. Dunstan's Church, Canterbury, England, St. John's University School of Law, Florida Coastal School of Law, Wake Forest University School of Law, and the Washington and Lee University School of Law. In March 2012, More's narrative will be featured in my lecture to the faculty of the Brigham Young University School of Law.

43. For hypothetical examples of the situations that give rise to dilemmas of conscience, see Part II of this Essay.

44. See Blake Morant, *The Declining Prevalence of Trials as a Dispute Resolution Device: Implications for the Academy*, 38 WM. MITCHELL L. REV. 1123, 1134-36 (2012) (noting negotiation exercises that demonstrate the importance of negotiation rather than litigation).

45. Thomas More, CLE Presentation at the Bar Center in Cary, N.C. (Apr. 24, 2008). Reviews of this CLE were uniformly superlative, noting that the use of More's narrative brought the discussion of rule of law proved to be intellectually stimulating and very engaging.

goal, in my view, remains key to a law teacher's relevance and fulfillment of her role as conservator of our professional tenets.

IV. CONCLUSION

This Essay commences with a description of the "perfect storm" that presently confronts legal education. The piece now ends with the admonition that, despite the challenges facing our industry, legal educators must continue to further aims of salient themes such as the rule of law. To this end, the use of historical narratives can become illustrative tools to reinforce the salience of and respect for the rule of law. My study of Sir Thomas More and the relevance of his professional dilemma of conscience reinforces this point. Kenneth "Ken" Loach, noted English film and television director, has stated: "History is contemporary. Your understanding of history confirms what you think of the present. It's not neutral."⁴⁶

Mr. Loach's words have profound applicability to law and those who teach and practice the discipline. A greater appreciation and commensurate use of historical narratives reinforces the rule of law, illustrates the contextual operation of the cognitive norms that grip lawyers who struggle with dilemmas of conscience, and ensures that teachers of the law fulfill their obligation as conservators of the profession.

46. *Ken Loach Quotes*, THINKEXIST.COM, http://en.thinkexist.com/quotes/Ken_Loach/ (last visited May 9, 2012); *see generally* BERT CARDULLO, LOACH & LEIGH, LTD.: THE CINEMA OF SOCIAL CONSCIENCE (2010) (tracing the way in which the work of directors Ken Loach and Mike Leigh has reflected the shift from the collectivist consensus of postwar years to individualist, more material concerns of modern years); JOHN HILL, KEN LOACH: THE POLITICS OF FILM AND TELEVISION (2011) (analyzing the career and work of film director Ken Loach and proclaiming him to be one of the great European directors).